

BEFORE THE FEDERAL ELECTION COMMISSION

2013 MAR 27 PM 11:12

OFFICE OF
COUNSEL

In re: Patriot Super PAC and)
Thomas Freiling, as treasurer;)
Steve Elliott)
_____)

MUR 6643

Response to Complaint

In accordance with 2 U.S.C. §437g(a)(1) of the Federal Election Campaign Act of 1971, as amended (FECA or Act) this response is filed on behalf of Patriot Super PAC, and Thomas Freiling as treasurer and Steve Elliott in his individual capacity (Respondents) in response to the above referenced matter. For the reasons stated below, the Commission should make a finding of no reason to believe and close the file.

I. Factual Summary

By a letter received at the Federal Election Commission (FEC or Commission) on September 12, 2012, Tim Edson, who represented himself as the campaign manager of the Allen West for Congress Committee filed allegations that the Respondents violated provisions of 2 U.S.C. §441h(b) (Complaint) pertaining to correspondence and solicitations made by Patriot Super PAC (PSP). It has been designated by the Commission as MUR 6643.

PSP filed its Statement of Organization with the Commission on January 13, 2012 indicating it was a non-connected multi-candidate committee and also filed a letter indicating that it would act as an independent expenditure only committee (IEOC) (see Exhibit A attached, Declaration of Thomas Freiling ("Decl.") ¶2).

On February 1, 2012 PSP launched a website at www.patriotsuperpac.com (Website) which continues to operate in support of the efforts of PSP. The PSP mission statement, as set out on the Website, indicates it was established to support the election of conservative candidates to federal office. Decl. ¶5. The Website also contained the requisite FECA disclaimer notices for written communications and best efforts notice requirements on the contribution solicitation page. Decl. ¶24).

In addition, on the Website under the title "About Us", it states, "By law, we are an independent expenditure only committee, sometimes referred to as a 'super PAC.' Federal law allows us to endorse and support candidates but we are not allowed to coordinate directly with candidates or political parties (so please don't even ask us to). The law also allows us to raise unlimited sums from individuals, corporations and other groups." Decl. ¶6.

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Thomas Freiling currently serves, and at all times related to this matter served, as executive director and as treasurer of PSP. Decl. ¶2. Steve Elliott is the president of Grassroots Action, a for-profit corporation which provides data base services, web site services and email services as vendor of PSP. Decl. ¶4.

Allen West (West) was first elected to the U.S. House of Representatives in 2010 from the 10th Congressional District of Florida and in so doing became the first black Republican member of Congress from Florida since 1876. He was viewed as a leader of the newly elected conservative members of Congress. West was heavily support by the "Tea Party" movement in Florida during his 2010 campaign and was a member of the Tea Party Caucus. Decl. ¶11.

Due to the apparent increase of registered Democrats in the 10th C.D. resulting from redistricting, West sought re-election in 2012 from the 18th C.D. West was identified as one of the 10 most vulnerable Republicans up for re-election in 2012 and it was a much publicized campaign. The 2012 year-end report filed with the FEC by the Allen West for Congress Committee indicates that the committee had total receipts of \$19,337,431 and disbursements of \$18,475,831. He won the Republican primary however was defeated in the general election by Patrick Murphy by a margin of 2,429 votes. Decl. ¶12.

In light of the leadership role West held within the conservative community coupled with his reported re-election vulnerability, PSP selected the West re-election as one of its initial independent expenditure efforts. Decl. ¶13.

In support of the re-election candidacy of Allen West in 2012, PSP decided it would produce a radio ad (Ad) which would support the candidacy of Allen West. Decl. ¶16. The Ad included requisite FECA disclaimers. Decl. ¶23.

In an effort to raise funds to pay for the production and airing of the Ad, PSP developed two (2) contribution solicitations which were emailed to potential contributors. The first solicitation entitled "The Big Lie" (Big Lie) and the second solicitation was entitled "The Jihad" (Jihad). The two (2) solicitations were sent out a total of five times between August 10, 2012 and September 11, 2012. A total of 347,965 emails were sent resulting in contributions from 371 persons totaling \$16,723. No single contribution exceeded \$100. Decl. ¶13.

The text of both the Big Lie and Jihad were signed-off by Thomas Freiling as Executive Director of PSP. Immediately below the signature were the FECA required disclaimer notices indicating it was paid for by PSP and it was not authorized by any candidate or candidate's committee. Decl. ¶23.

PSP produced the Ad and a link to the Ad was included in the Big Lie and Jihad emails to enable potential contributors to listen to the Ad to determine if they wished to support the effort.

Decl. ¶17. The cost for production and radio air-time totaled \$11,275. The Ad aired on WJNO, WPHR and WZTA radio stations, (which cover the 18th C.D.) between August 27 and August 31, 2012. Decl. ¶18.

Thomas Freiling intended for PSP to expend more funds, including the \$5,548 difference between contributions received from the Big Lie and Jihad mailings and the funds expended for the production and airing of the Ad. The purchase of additional air time for the Ad was targeted for the last weeks of the general election when it would have the greatest impact upon the electorate. However, once the Complaint was filed, Freiling abandoned that plan in light of West reaction to the PSP effort as expressed in the Complaint. Decl. ¶20.

H. Analysis and Argument

- A. 2 U.S.C. §441h(b) was enacted to supplement the original §441h provision but both provisions maintain the limited purpose of prohibiting fraudulent campaign related activity.

The Complaint alleges a violation of 2 U.S.C. §441h(b) which states,

No person shall---

- (1) Fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or
- (2) Willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

This statutory provision was added as part of Section 309 of the Bipartisan Campaign Reform Act of 2002 (BCRA), (Pub. L. No. 107-155) and became effective November 6, 2002. This provision amended the original §441h, by designating the original section as §441h (a) and adding the above referenced §441h (b).

The provisions of the original §441h and the designated §441h (a) are limited to actions taken by a candidate or a candidate's employee or agent and require that the fraudulent misrepresentation be damaging to the other candidate or political party. As noted in the Explanation & Justification for 11 CFR 110.16, prior to the enactment of §441h(b), the Commission had, "...historically been unable to take action in enforcement matters where persons unassociated with a candidate

or candidate's authorized committee (who) have solicited funds by purporting to act on behalf of a specific candidate or political party." (Fed. Reg. Vol. 67, No. 240, December 13, 2002). In its discussion in the E&J pertaining to the new §110.16, the Commission gave an example of a violation of §441h(a): "Section 441h(a) encompasses, for example, a candidate who distributes letters containing statements damaging to an opponent and who fraudulently attributes them to the opponent." *Ibid.* Similarly, the Commission continues in that E&J provision to note the type of activity that the new §441h (b) was intended to address. "Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor...BCRA's prohibition on fraudulent solicitations of contributions and donations implements those legislative recommendations." *Ibid.*

Therefore, the purpose of §441h (b) was to expand the scope of the persons against whom an enforcement action could be brought for fraudulent activities; it was not intended to include activities which were not inherently fraudulent. Both sections of §441h continue to require the perpetration of a fraud, whether by a candidate or any other person, in order to base a complaint upon this statutory provision.

Respondent recognizes that the standards by which to establish "fraudulent misrepresentation" do not require fulfilling the common law elements of fraud; namely, justifiable reliance and damages. *Neder v United States*, 527 U.S. 1, 24-25 (1999). Though this standard for tortious action is not required, there remains the obligation to prove one acted fraudulently, that is "acting with a deliberately-planned purpose and intent to deceive and thereby to gain an unlawful advantage. *Bank of Montreal v Thayer* (CC Iowa 1881) 7 F. 622, 225; fraudulent misrepresentation requires proof of "false representation (2) made in reference to a material fact, (3) with knowledge of its falsity, (4) with the intent to deceive, and (5) an action taken in reliance upon the representation. *Chedick v Nash et. al.*, 151 F. 3d. 1077, 1081 (DC, 1998), citing to *Hercules & Co., Ltd. V Shama Restaurant Corp.*, 613 A. 2d. 916, 923 (D.C. 1992).

It is against this legal standard of review that the facts, as they may be, in the Complaint must be assessed to determine if a §441h (b) violation is evidenced. As detailed below, the facts, as presented in the Complaint, fail to meet this legal standard to evidence fraudulent misrepresentation or intent to deceive.

B. The alleged facts represented in the Complaint fail to evidence a basis upon which to support in any fashion a potential violation of §441h (b).

The Complaint makes a variety of allegations upon which it attempts to justify a fact pattern for a violation of §441h (b) however, none of the factual allegations come close to evidencing a "fraudulent representation". Many of the other facts alleged actually support the legitimate PSP advocacy efforts supporting the re-election of West by PSP.

The facts alleged in the Complaint argue that the Ad produced by PSP is a violation of the FECA since it references Allen West and directs the listener to the PSP website to make a contribution to support the production and on-going airing of the Ad. It further claims that the solicitation using West's name and its other activities, presumably the Ad, were not authorized by West and PSP is not affiliated with the West campaign committee (Complaint page 2).

There is no provision of the FECA which prohibits the mere reference to a candidate by a PAC in its communications. In fact the very definition of and independent expenditure specifically requires the reference to a clearly identified candidate (2 U.S.C. §431(17)(A)). The facts related to this issue as alleged are correct but do not constitute the basis for a violation of the Act.

The Complaint goes on to state that PSP solicitations using West name were not authorized by West or the West Committee. As an IEOC the PSP communications were prohibited from being coordinated or authorized by West, the West Committee or any of their respective agents (2 U.S.C. §431(17)(B)). Again, the facts alleged are correct but they do not constitute the basis for a violation of the Act.

As will be discussed in detail below, the mere solicitation of contributions to PSP which include a reference to a candidate is not in-and-of-itself a violation of the Act. Such is often the case with in-kind contributions made by a PAC or in the case of independent expenditure communications soliciting contributions to be sent directly to a candidate committee or to be used by the IEOC to support the candidacy of that candidate. So once again, nothing in the facts inherently evidences a fraudulent representation or an intent to deceive the public which is the statutory standard against which the facts must be measured for determining a §441h (b) violation.

In a similar vein of attack, the Complaint argues that when the Ad stated the listener should "defend our Congressman" it was "intentionally designed to blur the line between Patriot Super PAC and Allen West own campaign committee..." (Complaint page 3). The mere use of the phrase "defend our Congressman" does not in any fashion provide any evidence that there was

an intent by PSP to fraudulently represent or deceive the public as to the authorship of the solicitations or the Ad. To allege PSP "blurred the line" is speculative and a mere opinion, not factual in nature. That lone claim is grossly inadequate to substantiate a cause of action that the phrase was a fraudulent representation or made with the intent to deceive and fails to meet the standard for a §441h(b) violation.

C. PSP included all requisite FECA disclaimer notices in all the communications at issue and that fact evidences there is no basis to allege any attempt to deceive those who received the PSP communication.

The FECA requires a variety of disclaimer notices depending upon the type of communication that is being made by the political committee. In this case, PSP, as an IEOC, made public communications expressly advocating a candidate's election in the radio Ad. This same advocacy was included in the two email solicitations (Big Lie and Jihad).

With reference to the Ad and the written solicitation, the FECA requires PSP as an unauthorized committee to clearly state the full name and website address (alternatively the permanent address and phone number) of the person paying for the communication and that the committee is not authorized by any candidate or candidate's committee (2 U.S.C. §441d (a)(3)). The Ad, the Website and the two email solicitations at issue complied with this disclaimer notice requirement. The disclaimers also complied with the provisions related to the acceptable size print and contrasting background (2 U.S.C. §441d(c)).

As a radio communication, the Ad was also required to state, "PSP is responsible for the content of this advertising". The Ad complied with this disclaimer requirement. Decl. ¶23.

The Website also contains the following disclaimer at the bottom of each page: "Paid for by Patriot Super PAC. Not authorized by any candidate or candidate committee. Contributions are not deductible as charitable donations for federal income tax purposes."

In addition, the contribution page of the Website complies with the best efforts requirements by requesting the name, address, occupation and employer for those who contribute in excess of \$200 in a calendar year (2 U.S.C. §432(i)).

As noted in the factual summary above, on the Website under the title "About Us" it states that, "By law, we are an independent expenditure only committee, sometimes referred to as a 'super PAC.' Federal law allows us to endorse and support candidates but we are not allowed to coordinate directly with candidates or political parties (so please don't even ask us to). The law also allows us to raise unlimited sums from individuals, corporations and other groups." Decl. ¶6.

It should also be noted that at each header for the Big Lie and Jihad email, it indicates that the message is being sent from PSP. Both emails are also signed-off by "Thomas Freiling, Executive Director, Patriot Super PAC". Directly below that signature were listed the FECA disclaimer notices: Paid for by Patriot Super PAC, patriotsuperpac.com. Not authorized by any candidate or candidate committee. Contributions are not deductible as charitable donations for federal income tax purposes. The fact this solicitation was signed off by Mr. Freiling, in his capacity as Executive Director of PSP, evidences once again a full disclosure of the entity making the solicitation and clearly is not in any fashion an attempt to fraudulently misrepresent or deceive the public as to the identity of the committee making the solicitation and producing the Ad.

Ironically, the Complaint is attempting to allege that by PSP fully complying with the disclaimer notice mandates of the FECA, it somehow provides a basis that PSP was acting in violation of the Act. It is a nonsensical argument. The fact PSP did not coordinate or receive authorization from West to proceed with the Ad was in full compliance with the FECA and provides no basis upon which to allege it was a "fraudulent representation" in violation of §441h(b). To have sought the permission of the West campaign, which is what the Complaint appears to claim is necessary, would have been a violation of the Act.

The fact PSP fully and accurately complied with the required FECA disclaimer notices evidences there was absolutely no intention to deceive the public or even an attempt to present a false representation to the public as to PSP being the entity responsible for the Ad and the beneficiary of the contributions made to PSP.

The PSP website provided all requisite FECA notice requirements and went one step further in providing an additional notice on the webpage under the title "About Us" describing in layman terms the fact that PSP is an independent expenditure committee and its efforts cannot be coordinated with any campaign committee. PSP fully complied with FECA notice requirements and it is up to the reader to take notice of those disclaimers. If PSP complies with the FECA notice requirements then there is a legal presumption that the reader has sufficient notice as to the nature of the committee's status (i.e., an independent expenditure committee) or has provided the reader sufficient legal standards by which to determine such status of the committee.

D. The contributions solicited to pay for the production and airing of the Ad where in fact used for those very purposes.

The Complaint states that as of the July 2012 quarterly report, PSP disclosed \$139,232.64 in operating expenses of which \$12,950 was disbursed for independent expenditures. The Complaint also states that included in the \$12,950 was \$5,000 spent on radio advertisements in support of Allen West (Complaint page 2).

The Complaint appears to claim that the percentage of funds used for independent expenditures contrast with the total amount raised was somehow in violation of the Act. To justify this claim the Complaint cites to a quote from MUR 5385, which states that the reason for §441h(b) was, “ ‘to prohibit fraudulent solicitation because contributors that people believed were going for the benefit of the candidate were diverted for other purposes, harming both the candidate and the contributors.’ ” (citation omitted).

Using the standard articulated in MUR 5385, one must conclude that none of the facts alleged in the Complaint constitutes a basis upon which to allege a violation of §441h (b).

First, the Complaint acknowledges that 38% (\$5,000 of \$12,950) of the funds expended for independent expenditures were made to benefit the West committee. That in-and-of itself evidences that there was no “fraudulent misrepresentation”; contributions solicited to support the re-election of West were in-fact expended on communications to support that re-election.

The PSP year-end report filed with the Commission provides the complete picture related to the PSP independent expenditure effort of West. As a result of the two solicitations (Big Lie and Jihad) PSP received contributions totaling \$16,723. PSP expended \$11,275 for the production and the airing of the Ad during the time frame of August 27, 2012 and August 31, 2012. Thus the contributions raised to pay for the Ad were in fact expended for that stated purpose.

There was a \$5,546 difference in the amount raised and expended for the Ad. As Mr. Frailing has stated, it was his intent to not only expend that \$5,548 but additional funds during the last weeks of the general election campaign to again air the Ad in the 18th C.D. in support of West re-election. It was his strategic opinion that the Ad would have a greater impact on the undecided voters during that time period. However, the West campaign filed the Complaint with the Commission on September 12, 2012. Once Mr. Frailing became aware of the Complaint containing false allegations of the PSP activities, he chose to stop and support efforts for the West re-election. Decl. ¶20.

There were sufficient overhead expenses indirectly related to the production and airing of the Ad and the two solicitation packages (such as expenses for renting data base to email) to justify

the payment of the \$5,548 as funds expended for legitimate overhead expenses. These were not funds diverted for fraudulent activities but rather for expenses reasonably associated with the production of the Ad and the email solicitations. Neither the Act nor the Regulations set out any type of "safe harbor" percentage that can be attributed to overhead for these types of independent expenditure efforts when contributions are solicited to support specific candidates. In this case, the expenditure of the \$5,548 for the overhead related expenses represented 33% of the funds raised; a very reasonable amount given the start-up nature of PSP.

Notwithstanding agreement as to whether the 33% represents a reasonable amount, the payment of overhead expenses does not constitute a fraudulent representation or an attempt to deceive the public as to the purpose and use of the funds. Therefore, this rather vague allegation in the Complaint is not supported by any facts which measure up to a violation of §441h (b).

E. The Big Lie email does not represent itself, nor fraudulently represent itself as being disseminated by the West committee.

There are only three (3) potential communications which could be the basis of the alleged violation of §441h (b). The first is the Ad which has been discussed above. The second is "Big Lie" email, a true and complete copy of which is attached hereto at Exhibit B.

The header of this email indicates that it is generated from PSP. The communication is signed off by Tom Freiling, Executive Director of Patriot Super PAC. It is followed by the requisite FECA disclaimer notice indicating the PAC is not authorized by any candidate or candidate committee. There is no statement in the communication that it is sent by the West campaign committee.

This communication merely advocates support for the West election and does not indicate in any fashion that it is being sent by or on behalf of the West committee. This communication does not constitute a violation of §441h (b).

In addition, contrary to the contentions of the Complaint, this email was a positive message regarding the re-election of West to Congress. That message does not constitute a fraudulent message; it is an accurate message to support the re-election of West.

F. The Jihad email does not represent itself, nor fraudulently represent itself as being disseminated by the West Committee.

The third communication at issue is the Jihad email solicitation. The header of this email indicates that it is generated from PSP. The communication is signed off by Tom Freiling, Executive Director of Patriot Super PAC. It is followed by the requisite FECA disclaimer notice

indicating the PAC is not authorized by any candidate or candidate committee. There is no statement in the communication that it is sent by the West campaign committee.

This communication merely advocates support for the West election and does not indicate in any fashion that it is being sent by or on behalf of the West committee. This communication does not constitute a violation of §441h (b).

In addition, contrary to the contentions of the Complaint, this email was a positive message regarding the re-election of West to Congress. That message does not constitute a fraudulent message; it is an accurate message to support the re-election of West.

G. The business operations of PSP evidence a professional and business-like approach to the formation and operations of PSP as a long-term organization.

The Complaint makes vague references to the business expenses paid by PSP and its operations with Steve Elliott as being in violation of 441h (b) because, "Both (Freiling and Elliot) are sophisticated enough to be well aware that there is substantial profit to be made attaching themselves to Congressman West and claiming to act on his behalf and for his benefit." (Complaint page 3).

The facts pertaining to the West solicitation and the Ad do not support that claim of PSP making a "substantial profit" with its support of West re-election. The Complaint is rather delusional as to the financial response to solicitations to support West. There were 347,965 emails sent soliciting support for the Ad and a total of \$16,723 received. That amounts to approximately 4.8 cents per email; not exactly the basis upon which to generate "substantial profit".

Making any type of profit was never the reason for the West project by PSP. The purpose was to support a conservative incumbent congressman who was in clear jeopardy of losing his re-election bid. Deel. ¶13. There is obviously a need to pay overhead for any type of political committee's operation and that is precisely what occurred in this matter. Though one may differ with the amount expended for overhead, the 33% figure is very reasonable and under no circumstances does it raise to the level of constituting "fraudulent representation" which is the standard to be met for an alleged violation of §441h(b).

The Complaint has failed to evidence any type of fraudulent representation or intentional deceit which are the standards which must be met for finding a violation of §441h (b). As such, Respondents request the Commission make a finding of no reason to believe as it pertains to PSP and Tom Freiling as treasurer.

H. The Complaint fails to set forth any facts upon which to base a violation of §441h(b) by Steve Elliott.

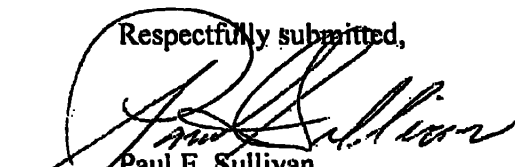
The Complaint names Steve Elliott as a respondent in this matter, however it fails to set forth any facts whatsoever upon which to base a potential violation of §441h (b). Mr. Elliott is the president of Grassroots Action, a for-profit company that manages a large data base of know conservative donors and activist. Decl. ¶4. Grassroots Action, under an arms-length agreement, provided the data base and supervised the distribution of the emails for the Big Lie and the Jihad solicitation packages. Merely serving as a vendor for PSP provides no grounds upon which to extrapolate any type of violation of the Act.

The Regulations require that a Complaint filed with the Commission, "...should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction;" 11 CFR 111.4(d)(3). The Complaint has failed to meet this regulatory mandate. Because the Complaint fails to set forth any facts upon which even an allegation of a violation occurred, Respondents request the Commission make a finding of no reason to believe as to Steve Elliott and Grassroots Action and close the file.

III Conclusion

For the reasons stated above, the Commission should make a finding of no reason to believe with respect to each of the Respondents and close the file in this matter.

Respectfully submitted,



Paul E. Sullivan
Counsel to Patriot Super PAC